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In The

Supreme Court of the United States

HELEN LAVONNE WELLS, MARIE R. MOORE, NELDA J. HARRISON, and JANE A. SLOAN,

Petitioners,

vs.

TEXAS A&M UNIVERSITY SYSTEM dba TEXAS A&M UNIVERSITY-COMMERCE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

The issue presented to this Court on appeal is as follows:

Whether Respondents waived their right to claim immunity from suit under the federal Fair Labor Standards Act ("FLSA"), when Respondents' Regents, acting in their official capacity pursuant to authority delegated to them by statutes enacted by the Texas legislature, adopted an employment policy that compelled the components of the Texas A&M University System ("TAMU") to comply with the FLSA; and whether the Respondents' conduct of contracting with employees and representing to employees through multiple, duly-adopted, printed policies, rules, and regulations, referencing compliance with the FLSA, constituted a waiver of sovereign immunity by conduct.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners HELEN LAVONNE WELLS, MARIE R. MOORE, NELDA J. HARRISON, and JANE A. SLOAN respectfully pray that a writ for certiorari issue to review the opinion and judgment of the Texas Court of Appeals for the Sixth District, entered on September 24, 2004. Petitioners timely filed a Petition for Review in the Supreme Court of Texas, requesting review of the opinion and judgment of the Texas Court of Appeals for the Sixth District, but the Supreme Court of Texas denied Petitioners' Petition for Review on January 21, 2005. (*See* Supreme Court Notice Letter at App. 13.)

OPINIONS BELOW

The opinion of the Texas Court of Appeals for the Sixth District court of appeals is not reported but it is reprinted in Petitioner's Appendix at App. 1-6. The relevant orders of the district court are also unpublished, and are reprinted in Petitioners' Appendix at App. 7-12.

STATEMENT OF JURISDICTION

The Texas Supreme Court's denied Petitioners' Petition for Review on January 21, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Tenth Amendment of the United States Constitution provides, in relevant part:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The Eleventh Amendment of the United States Constitution provides, in relevant part:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 216(b), 203(x).

STATEMENT OF THE CASE

Petitioners sued Respondents in state court, seeking to recover unpaid wages, overtime compensation, liquidated damages, interest, attorney's fees and costs in accordance with Section 216(b) of the Fair Labor Standards Act of 1938 ("the Act" or "FLSA"). In response,

Respondents filed a Motion to Dismiss for Lack of Jurisdiction. Petitioners filed a Response to Respondents' Motion. On October 17, 2002, after the first hearing on Respondents' Motion to Dismiss, the Court denied Respondents' Motion, ruling in favor of Petitioners. Thereafter, Respondents filed an Amended Motion to Dismiss for Lack of Jurisdiction, to which Petitioners filed a Response, including a request to abate the litigation to allow Petitioners time to obtain Legislative permission to prosecute their suit in the 196th Judicial District Court of Hunt County, Texas. On January 15, 2003, the Court granted Petitioners' Motion to Abate until July 1, 2003, in an effort to give Petitioners sufficient time to obtain legislative permission to sue.[1] When Petitioners failed to obtain legislative permission to prosecute the suit, the Court set the matter for hearing on September 19, 2003. At the hearing, the Court stated that, "not with any pride" and because "It's a sad situation that our state causes this problem," he was granting Respondents' Motion to Dismiss for Lack of Jurisdiction and he signed an order dismissing Petitioners' suit on that same day.

Petitioners timely filed a Motion for Reconsideration and a Notice of Appeal.

The Texas Court of Appeals for the Sixth District denied Petitioners' appeal by Memorandum Opinion. Petitioners filed a Petition for Review in the Texas Supreme Court, which was denied on January 19, 2005.

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[1] On August 5, 2003, Petitioners' counsel filed a letter to the District Court Judge Joe Leonard, advising the court of Petitioners' failed efforts to obtain legislative permission to sue. C.R. 160-171.

STATEMENT OF FACTS

A. Background Facts.

Between July 19, 1999 until July 19, 2002, when suit was filed, Petitioners were employed as housemothers by Respondent Texas A&M-Commerce ("Commerce"). The "housemother" position description was rated by Commerce as a "non-exempt" position under the FLSA. Petitioners were required to work more than 40 hours per week, but the Respondents refused to pay them for the excess hours worked. In addition, for substantial periods of time, Petitioners were required to remain on call and hold themselves in readiness and be available for duty twenty-four hours per day, seven days per week on or near the premises of Commerce, except for time away for holidays and leave time. Commerce required Petitioners to record their on-call time as "off-duty" time and did not compensate Petitioners for on-call time as required by the FLSA. Petitioners sought to recover their full compensation for work performed as defined by the FLSA.

B. Facts Related to Texas A&M University System Policies and Representations.

Respondent Texas A&M University System ("TAMU"), including its component unit at Commerce, is a duly organized state agency formed and adopted through legislative enactment in conformity with the *Tex.Educ.Code* §§ 85.01, et seq. The government of TAMU is vested in a board of nine regents appointed by the governor with the advice and consent of the Texas senate to ensure conformity with all laws and rules *Tex.Educ.Code* § 85.11. The Board of Regents is authorized to make bylaws, rules, and regulations it deems necessary and proper for the government of

the university system and its institutions, agencies, and services. *Tex.Educ.Code* § 85.21(a).[2]

Prior to, during, and since Petitioners were employed by Commerce, the TAMU Board has adopted and maintained policies and operated under a set of rules and regulations lawfully promulgated by Respondents and memorialized in handbooks and manuals distributed to Petitioners during their employment. Petitioners also signed annual appointment letters/contracts each year.

Excerpts from the TAMU Policy Manual, Sections 01.01, et seq., last revised May 28, 1999, defined the "Scope and Authority" of TAMU policies as follows:

> The official actions of the Board of Regents of the Texas A&M University System and its component universities, agencies, the Health Science Center (HSC), administrators, employees, and agents are governed by the following:
>
> 1. Federal and State Law
>
> All policies of the Texas A&M University System are subject to all relevant laws, rules, and regulations of the federal government and the government of the State of Texas. *It is the policy of the Board to comply with state and federal laws, rules, and regulations at all times. Any policy,*

[2] The Board is also specifically authorized, upon terms and conditions acceptable to it, to accept and administer gifts, donations, grants, and endowments, from any source for use by the system or any of the components of the system. *Tex.Educ.Code* § 85.21. The Board has authority to order that all expenditures be paid and shall be paid on warrants from the comptroller based on vouchers approved by the president of the board or by some officer or officers designated by him in writing to the comptroller. *Tex.Educ.Code* § 85.22.

regulation, rule or procedure found to be in conflict with a state or federal law, rule, or regulation shall be null and void to the extent of the conflict. " . . . [Italics supplied]

. . .

6. University, Agency and HSC Rules

6.1 Component Rules shall be used as governance documents for the component consisting of: . . .

(5) matters unique to the university, agency, or HSC addressing uniform compliance with fiscal, academic, research, human relations, and other management standards and requirements imposed from external federal or state law agency rule. University, Agency and HSC Rules are null and void to the extent they conflict with System Policies, System Regulations, or System Administrative Memoranda. Copies of component Rules, and amendments thereto, shall be furnished to the Chancellor, who shall be responsible to assure consistency with System Policy and System Regulations.

. . .

6.3 Universities, agencies and the HSC may distribute printed handbooks, bulletins, etc., to provide information to faculty, employees, students, or other constituent groups. Such materials shall, however, include a disclaimer which establishes the preeminent authority of System Policies,

System Regulations and University, Agency or HSC Rules . . .

Policy 31.01 of the TAMU System Policy Manual, relating to "Compensation" is supplemented by the following TAMU System Regulation 31.01.01, governing "Compensation Administration" and Regulation 31.01.02, governing "Fair Labor Standards", which state:

Regulation 31.01.01:

1. COMPENSATION PHILOSOPHY

The System is committed to providing excellence in education, research and service. To Achieve the System's high purposes and ambitious goals, System components must attract and retain a well-qualified work force. *Integral to the employment relationship is the competitiveness, equity and fairness of the compensation regulations.* [Italics supplied]

2. DEFINITIONS

2.1 Total compensation includes not only direct pay but also indirect compensation including insurance and retirement benefits and time off programs. The Texas legislature sets eligibility requirements for those benefits and programs, based on the definition of regular employee. A regular employee is one who is listed in the position identification database for 50 percent or more time for at least four and one-half months, excluding students employed in positions that require student status as a condition for various programs appear in the appropriate policies and regulating. . . . [Italics supplied]

2.2 Position Categories. The System categorizes positions into the following groups:

. . .

(4) Professional and Administrative Positions gave a high degree of executive, professional and/or administrative responsibility, *as those terms are defined in the Fair Labor Standards Act (FLSA), and meet the FLSA test for exemption*. [Italics supplied]

(5) Classified positions involve the performance of staff support, clerical, craft, trades, technical, maintenance or service activities or, as a primary responsibility, the direct supervision of individuals performing such activities. *Most, but not all positions are nonexempt under FLSA standards* . . . [Italics supplied]

3. NON-DISCRETIONARY COMPENSATION

3.1 Minimum Wage – Each System component *will* establish wage rates in compliance with federal and state minimum wage regulations. *See* System Regulation 31.01.02, FLSA . . . [Italics supplied]

4. AUTHORITY TO SET SALARIES AND WAGES

4.1 System Policy 01.03 details the authority of the Board of Regents, Chancellor and CEOs regarding appointments and compensation . . .

5. COMPENSATION ADMINISTRATION

Each CEO shall establish and communicate salary administration rules, procedures and pay plans for all categories of positions, except

Board-appointed positions, existing in his/her component. These rules and pay plans should address internal equity, objective and fair treatment, competitiveness with appropriate external markets, and *compliance with appropriate federal and state laws.* Pay plans must interface with the Budget Payroll Personnel (BPP) system design. [Italics supplied]

Regulation 31.01.02:

1. GENERAL

1.1 ***System components will comply with the Fair Labor Standards Act (FLSA) and related federal state laws.*** [Emphasis added and italics supplied]. Related administrative procedures are detailed in the HR Manual.

1.2 All faculty, staff and student employees (except as set out in Section 1.3) of the System are covered by the *FLSA*, although certain classes of employees are exempt from its overtime pay and minimum wage requirements. ***An employee's rights under the FLSA may not be waived. No employee may agree, even voluntarily, to work in violation of the FLSA . . .*** [Emphasis added and italics supplied]

1.3 Graduate students that are simultaneously performing research under grants and contracts and are fulfilling the requirements of an advanced degree are exempt from overtime pay and minimum wage requirements.

2. MINIMUM WAGE PROVISIONS

The System pays all employees, including student workers, at least the federal minimum wage prescribed by the FLSA. [Emphasis added and italics supplied]

3. DETERMINATION OF EXEMPTION STATUS OF EMPLOYEES

Each employee's ***overtime pay and minimum wage coverage under the FLSA (exempt, nonexempt, or partially exempt) must be determined on an individual basis in accordance with the terms of the Federal regulations.*** When questions arise concerning an employee's status under the FLSA, advice of the relevant human resources office should be obtained. [Emphasis added and italics supplied]

4. OVERTIME

The *FLSA* and state law govern the handling of overtime work. See System Regulation 31.01.09 Overtime for more information.

. . .

6. EQUAL PAY FOR EQUAL WORK UNDER THE *FLSA*

System employees are covered by the Equal Pay Act, and amendment to the *FLSA*, that prohibits gender-based wage differentials between persons employed in the same location on jobs that require equal skill, effort, and responsibility and that are performed under similar working conditions. Jobs need only be substantially equal, not identical, for comparison purposes. The law permits differences in pay based on factors other

than gender such as bona fide seniority or merit systems or systems that reward productivity.

. . .

8. EXAMINATION BY DEPARTMENT OF LABOR REPRESENTATIVES

8.1 If an examination is initiated by Wage and Hour or Equal Employment Opportunity Commission representatives, the head of the department or comparable administrative unit being examined will immediately report the pertinent facts through normal channels to the appropriate Human Resources Officer and CEO. The System Human Resources Office will also be notified immediately so that office may provide counsel concerning federal regulations, assist in resolving charges of noncompliance or other findings of the federal representatives and communicate information from the examination Systemwide.

8.2 *The FLSA forbids discharge of or discrimination against employees who file complaints alleging noncompliance or who participate in legal proceedings under the law*. [Italics supplied]

9. ADMINISTRATION

9.1 *The SHRO is responsible for administering and answering questions on the FLSA, for all System components.* Inquiries as well as requests for special exemptions should be submitted to that office through the appropriate human resources officer. Interpretations of the *FLSA* legal issues should be directed to the System Office of General

> Counsel. Component human resources offices may also consult the Department of Labor or outside consultants for advice on *FLSA* matters, and any information received should be forwarded to the SHRO and the General Counsel for dissemination System-wide. [Italics supplied]
>
> 9.2 The human resources office of each System component is responsible for posting, and keeping posted, notices pertaining to the applicability of the *FLSA*. ***These notices, which can be obtained from the Department of Labor, are to be displayed in conspicuous places to facilitate observation by all employees.*** [Emphasis added and italics supplied]
>
> 9.3 Component human resources offices are also responsible for ensuring that all *FLSA*- and DOL-required records are maintained.

C. Facts Related to Texas A&M-Commerce, acting as a component of TAMU.

Tex.Educ.Code § 87.551 provides that "East Texas University at Commerce" (i.e., Texas A&M University-Commerce) is under the management and control of the TAMU board of regents with the same power and duties conferred on the board by law concerning TAMU.

One of the handbooks, adopted by Respondent Texas A&M-Commerce and distributed to Petitioners, is known as the "Texas A&M University Commerce Employee Handbook Non-Academic Staff," hereafter referred to as "the Employee Handbook." The face of this handbook purported to issue from the "Office of Human Resource

Management and Equal Opportunity." On page 10 of the Employee Handbook, under the heading "Compensatory Time" is the following paragraph:

> "All employees who are subject to the Fair Labor Standards are eligible for compensatory time if they work overtime. Employees earn compensatory time of one-and-one-half times the overtime hours worked in excess of 40 hours per week."

On the very last page (unnumbered) after the Appendix of the Employee Handbook is a signature page which each employee must sign and date, signifying receipt of the Employee Handbook, and return to the Department of Human Resources to be placed in the employee's personnel file.

Another of the handbooks, referencing the FLSA, is entitled the "Texas A&M University Commerce Compensation Manual Non-Academic Staff," hereinafter referred to as "the Compensation Manual." The face of this handbook also purports to issue from the "Office of Human Resource Management and Equal Opportunity." Page 1 of the Compensation Manual defines and/or explains "compensation terminology." Under the heading "Exempt," the Manual states:

> "Positions that are exempt under the Fair Labor Standards do not accrue overtime or compensatory time when the employee works in excess of 40 hours in a workweek. The three categories of exemptions relate to executive, administrative, and professional employees. Exempt status is based on the POSITION's actual job duties and responsibilities."

Under the heading "Nonexempt," the Manual states:

> "Nonexempt positions accrue overtime pay under the Fair Labor Standards Act. Overtime at Texas A&M University-Commerce is compensated by time off at one and one-half time for each hour worked in excess of 40 hours per week. Management may elect to compensate for overtime with pay at one and one-half the regular rate of pay. This is determined on a case by case basis."

Pages 2 and 3 of the Compensation Manual provide an illustration of the general format used for the classification and description of each job offered by Respondents. The Manual provides that the "FLSA Status" of the "housemother" is "Non-Exempt."

The Manual also addresses issues associated with "Creating New Positions," which contains the following paragraph:

> "The creation of new positions may be required to meet new departmental needs and initiatives. When this occurs, an attempt should be made to match the new position with one that is currently included in our Classified Pay Plan. The position will assume the established title and pay range. Should the new position not match a position included in the pay plan, a job description must be developed and the position will be evaluated to determine the appropriate salary, and *FLSA* (overtime exemption) status. [Italics supplied]

Pages 9 and 10 of the Manual include a discussion of how to "determine if a position is exempt from the overtime pay provisions of the *Fair Labor Standards Act (FLSA)*." On those two pages a number of questions are to be answered by the person in charge of making the determination of

whether the job will be classified exempt or nonexempt for purposes of compliance with the overtime provisions of the *FLSA*. The last reference to the *FLSA* in the Compensation Manual is on page 12 in a form titled "Position Allocation Notice." Again, the form provides a place for inclusion of *FLSA* status as part of the body of the form.

STANDARD OF REVIEW

In *Texas DOT v. Jones*, 8 S.W.3d 636, 638 (Tex.1999), the Texas Supreme Court held that once a plea to the jurisdiction is filed alleging immunity from suit, the Court must determine three things: (1) if the suit falls within the Tort Claims Act, (2) if the State has granted permission to sue, or (3) *if there is some other waiver of immunity.* Petitioners' claims are contract claims and do not fall within the Tort Claims Act; and Petitioners have not been given permission to sue by the State. Petitioners contend that the State of Texas has waived its sovereign immunity in two ways. First, the legislature has expressly delegated authority to the Board of Regents of the Texas A&M University System ("TAMU") to adopt employment policies and to make rules and regulations implementing such policies; and, pursuant to the authority delegated by the legislature, the TAMU System adopted a policy which compelled its components to comply with the Fair Labor Standards Act. Second, the Respondents' conduct of contracting with employees and representing to employees through numerous printed policies, rules, and regulations, referencing compliance with the FLSA, constitutes a waiver of sovereign immunity by conduct. Petitioners have performed their part of the bargain, but TAMU and Commerce have not complied with the FLSA provisions

incorporated by reference into the contracts, policies and procedures adopted by TAMU.

ARGUMENT AND AUTHORITIES

Respondents waived their right to claim immunity from suit under the federal Fair Labor Standards Act, when Respondents' Regents, acting in their official capacity, pursuant to authority delegated to them from the Texas legislature, adopted an employment policy that compelled the components of the Texas A&M University System to comply with the Fair Labor Standards Act ("FSLA"); and/or the Respondents' conduct of contracting with employees and representing to employees through multiple, officially-adopted, printed policies, rules, and regulations, referencing compliance with the FLSA, constitutes a waiver of sovereign immunity by conduct.

First of all, *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) is not dispositive of this case. In *Alden*, the state probation officers brought suit under the FLSA in state court. The *Alden* court held that the Fair Labor Standards Act, enacted by the United States Congress, which included a provision that authorized private actions against states in state courts, was an unconstitutional abrogation of sovereign immunity unless the state consented to be sued in state court. The probation officers did not assert claims that the state waived its immunity from suit by adopting federal labor standards act provisions into Maine's state policies and regulations governing employment benefits for state employees.

In this case, Petitioners, who were employees of the TAMU System, an agency of the state of Texas, sued in state court to enforce the system's policies and procedures that expressly adopted by reference the FLSA standards as the standards for the TAMU system's employment policies. This suit was *not* brought "under the FLSA" as stated by Respondents, but was instead brought to enforce an annual written employment contract that incorporated many of the provisions of the FLSA into the policies and regulations adopted by TAMU.

For the first time, in 1997, the Texas Supreme Court definitively held that the State was protected by sovereign immunity from suit in contract disputes, as well as tort actions between the State and private parties. *Federal Sign v. Texas So. Univ.*, 951 S.W.2d 401 (Tex. 1997).[3] In

[3] As noted supra, this case involves a breach of contract claim – not a tort. Texas first carved out an exception to the rule of sovereign immunity from suit in a landmark decision in the case of *Fristoe v. Blum*, 45 S.W. 998, 999 (1898), holding that sovereign immunity from suit would not be applicable if the State entered into a contract with a private party. Although *Fristoe* was often ignored, there was a long line of cases in which Texas courts found that the sovereign did waive immunity when it contracted with private parties. [*See, e.g.*, *Industrial Constr. Management v. DeSoto Indep. Sch. Dist.*, 785 S.W.2d 160, 163 (Tex. App.-Dallas 1989, no writ) (following rule set forth in *Fristoe* that sovereign immunity doctrine does not apply to contracts made by state and noting distinction between state as sovereign and state as contracting party); *Texas Dep't of Health v. Texas Health Centers*, 871 S.W.2d 498, 506 (Tex. App.-Dallas, 1993, writ denied) (holding that state lays aside its sovereign attributes when it contracts with private citizen); *Ferris v. Texas Bd. Of Chiropractic Examiners*, 808 S.W.2d 514, 518 (Tex. App.-Austin 1991, writ denied) (restating rule that sovereign immunity does not bar citizen's right to enforce contractual obligations against state); and *Bache Halsev Stuart Shields, Inc. v. University of Houston*, 638 S.W.2d 920, 931 (Tex. App.-Houston [1st Dist.] 1982, writ refd n.r.e.) (citing *Fristoe* and a collection of cases that recognize the contract exception to the doctrine of sovereign immunity).

(Continued on following page)

1999, the Texas Legislature enacted provisions that created a dispute resolution procedure to resolve certain breach of contract claims against the State through an administrative process. *Tex.Gov't.Code* § 2260.001, et seq., aka "The Act of May 30, 1999." Compliance with the processes outlined in the Act is a prerequisite to the use of Chapter 107 of the *Tex.Civ.Prac. & Rem.Code* as a vehicle for obtaining permission from the Legislature to bring suit against the state. *Tex.Gov't.Code* § 2260.005. Petitioners were not able to use this alternative resolution procedure to resolve their breach of contract claims, because the Texas Legislature wholly failed to include any administrative remedies for contract disputes with its employees relating to employment and compensation policies promulgated by the State and/or its agencies. The 1999 Act deals solely with independent contractors and does not allow state employees to utilize the administrative procedures if they are seeking relief for breach of employment contracts with any unit of state government. *Tex.Gov't.Code* § 2260.001(2)(B) and (4). Thus, Petitioners could not

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In fact, up until the late 1990's, almost every Texas suit involving a claim of whether or not the state has waived its sovereign immunity in a contract action has been resolved by posing the question of whether or not there has been complete performance by the private party to the contract and/or whether or not the governmental unit has received and accepted the benefit of such performance. It appeared that when these inquiries could be answered in the affirmative, various courts of appeals have held that a waiver by conduct on the part of the state can be established and state's claim to immunity should be denied. [*See Tsumi, Inc. v. Texas Parks & Wildlife Dep't*, 23 S.W.3d 58, 61 (Tex. App.-Austin 2000, no pet.); *Texas Natural Resource Conservation Comm'n v. IT-Davy*, 998 S.W.2d 898, 901-902 (Tex. App.-Austin 1999, pet. filed); *Texas S. Univ. v. Araserve Campus Dining Servs., Inc.*, 981 S.W.2d 929, 930-931 (Tex. App.-Houston [1st Dist.] 1998, pet. denied); *Alamo Community College Dist. v. Obavashi Corp.*, 980 S.W.2d 745, 747-749 (Tex. App.-San Antonio 1998, pet. denied)].

present their claims through the administrative precursor for obtaining permission from the Legislature to bring suit against the state. Finally, in 2001, the Texas Supreme Court held that the state does not waive immunity from a breach of contract action by accepting the benefits of a contract. *General Services Commission v. Little-Tex. Insulation Company, Inc.*, 39 S.W.3d 591 (Tex. 2001). In deciding that the state's acceptance of benefits under a contract was insufficient to waive sovereign immunity, the Texas Supreme Court obviously overlooked the fact that TAMU had adopted policies that mandated that its component units comply with the standards set forth in the FLSA and the employees were therefore entitled to the benefits that were incorporated into the employment policies of the TAMU System.

It is undisputed that TAMU's policies incorporated by reference the provisions of the FLSA that defined and regulated the wages and benefits for all employees of the TAMU system. Despite the fact that the TAMU system did not expressly adopt the FLSA provision allowing employees to sue employers in the event that the employer failed to comply with the FLSA, Petitioners contend that TAMU accepted the benefits of its employees' labor and that TAMU's acceptance of benefits should constitute a waiver of sovereign immunity from suit in this case.

Alternatively, Petitioners contend that the Texas legislature expressly delegated authority to the Board of Regents of the TAMU System to adopt policies and make rules and regulations implementing such policies; and, pursuant to the authority delegated by the legislature, the TAMU System has adopted a policy which compelled its components to comply with the FLSA, including but not limited to the FLSA provision that authorizes an employee

to bring suit against his or her employer for non-compliance with the FLSA. The TAMU system should not now be heard to claim "king's X" after accepting the benefits of the labor performed by its employees.

While it may be argued that some or all of the contract cases, involving the issue of waiver of sovereign immunity, have now been supplanted in whole or in part by more recent Texas Supreme Court decisions and the enactment of The Act of May 30, 1999, Petitioners contend that the analysis remains the same for them because the implementation of The Act of May 30, 1999, does not give them any avenue of redress other than the Courts of this State or of the Federal Court system.

The Courts of Texas have said that these dedicated employees cannot seek redress from the state. The doors of justice have been shut in their faces. How can anyone look at the situation in this case and argue that it is good public policy for the State of Texas to call upon the Legislature and the Court to assist the State in disenfranchising the state's own employees by entering into employment agreements with its citizens and then withholding all legal remedies so that its employees are totally deprived of the right to challenge the acts of their state employer in any judicial or administrative forum? Hopefully, the Texas Supreme Court and the legislature have not intentionally created a "gap" in the coverage provided by the Act of May 30, 1999, but unfortunately the "gap" was not closed in the last legislative session.

REASONS FOR GRANTING THIS PETITION

Under the circumstances at this time, Respondents' refusal to permit Petitioners to pursue legal action to procure the overtime wages described in the TAMU personnel policies is an unconstitutional and unconscionable "taking of property" without due process and equal protection under the law. A fundamental tenant of the Constitution of both the United States and the State of Texas is that the government cannot take a property right from an individual without first following certain guidelines, also known as "due process". The fact is that Petitioners have a property interest in their wages and overtime pay. It is this property interest that the State of Texas is now trying to deny and that Respondents are effectively taking from Petitioners.

The fact that a State may claim and retain immunity from private suit in their own courts under the protection afforded it by the Eleventh Amendment, does not give a state the right to disregard the Constitution of the United States, in particular the Fifth Amendment and the takings clause. Even in *Alden v. Maine*, cited supra, the Court made it clear that "[t]he constitutional privilege of a state to assert its sovereign immunity in its own courts does not confer upon a state a concomitant right to disregard the Constitution. The states and their officers are bound by obligations imposed by the Constitution . . . " *Alden*, 527 U.S. at 755, 119 S.Ct. at 2266. The Fifth Amendment in general and the takings clause in particular are integral parts of the U.S. Constitution and the Texas Constitution has similar provisions that should be applicable in this case. Another fundamental tenant of the Constitution of both the United States and the State of Texas is that all citizens should enjoy equal protection under the law.

However, when applied to Petitioners, and all other employees of the State of Texas, there is no equal protection afforded them by the FLSA because they are employed by the State and its agencies that control access to Texas courts.

The State of Texas, in its published employment policies of TAMU and Commerce, have represented to Petitioners that they have all the protections available under the FLSA; but, when Petitioners filed suit to enforce the protections that were promised to them, the State of Texas negated its promises by invoking its sovereign immunity from suits in Texas courts. On one hand, the State claims it is willing to give a fair wage, as required by the FLSA; but, when it comes to enforcement in the courts, the state is not willing to put its money where its mouth is. How can the sovereign expect its subjects to be loyal to the sovereign when the sovereign relies on illusory promises to oppress its subjects? A sovereign that can and does oppress is a sovereign that is a tyrant. What greater form of oppression can there be than to steal from the dedicated and hard-working mothers and grandmothers who served as "housemothers" for college coeds?

Many courts have proudly opined that sovereign immunity emanates from the "people." Surely, the "people" of Texas would prefer that the State and its agencies pay their grandmother, mothers, aunts, sisters, and daughters the wages that they were promised, and Petitioners in this case should be entitled to redress in Texas courts.

PRAYER FOR RELIEF

FOR ALL THE REASONS SET FORTH ABOVE, Petitioners pray that this Honorable Court grant this Petition for Writ of Certiorari and, after briefing on the Merits, reverse the decision of the Texas Court of Appeals for the Sixth District and/or remand to the Texas Supreme Court with instructions to reverse the decision of the Texas Court of Appeals for the Sixth District, and finally remand the case to the 196th District Court of Hunt County, Texas, for trial on the merits.

Respectfully submitted,

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Attorneys for Petitioners

[SEAL]

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-04-00001-CV

HELEN LAVONNE WELLS,
MARIE R. MOORE, NELDA L. HARRISON
AND JANE A. SLOAN, Appellants

V.

TEXAS A&M UNIVERSITY SYSTEM D/B/A
TEXAS A&M UNIVERSITY-COMMERCE,
TEXAS A&M UNIVERSITY-COMMERCE, AND
DR. KEITH MCFARLAND, PRESIDENT OF TEXAS
A&M UNIVERSITY COMMERCE, Appellees

On Appeal from the 196th Judicial District Court
Hunt County, Texas
Trial Court No. 65,080

Before Morriss, C.J., Ross and Carter, JJ.
Memorandum Opinion by Chief Justice Morriss

(Filed Sep. 24, 2004)

MEMORANDUM OPINION

Four former "house mothers"[1] employed by Texas A&M University Commerce[2] claim the School did not pay them overtime wages as required by both the federal Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219 (West 1998) (the "Act"), and the School's own expressed policy that it comply with the Act. The trial court dismissed for want of jurisdiction, concluding that the School was an arm of the State,[3] that the State had not consented to be sued by private individuals in this situation, and that therefore the School was immune from this suit. Plaintiffs claim that sovereign immunity was waived by the School's policies and manuals, which had been approved by the School's governing board (the "Board"). We affirm.

As pointed out by the School, the United States Supreme Court has held that the Act is unconstitutional to the extent it provides that private actions may be brought against states or their political subdivisions, such as the School. *Alden v. Maine*, 527 U.S. 706, 754 (1999). Therefore, before such an action may be pursued, consent to the action must be provided by either statute or legislative resolution. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997).

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[1] Plaintiffs and appellants are Helen Lavonne Wells, Marie R. Moore, Nelda J. Harrison, and Jane A. Sloan. We will call them "Plaintiffs."

[2] Texas A&M University System, d/b/a Texas A&M University Commerce, the primary defendant, will be called the "School." Also named as a defendant was Keith McFarland, president of the School, though his involvement raises no issues on appeal. For convenience, he will be considered part of the "School" for the purposes of this opinion.

[3] Texas A&M University is an agency of the State, pursuant to TEX. EDUC. CODE ANN. §§ 85.01, *et seq.* (Vernon 2002).

As this Court has very recently recognized, it is the Legislature's sole province to waive or abrogate sovereign immunity,[4] and any waiver must be expressed clearly and unambiguously. *Tex. Nat'l Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853-54 (Tex. 2002); *City of Texarkana v. City of New Boston*, No. 06-04-00023-CV, 2004 WL 1665012 (Tex. App. – Texarkana July 23, 2004, no pet. h.).

In this case, Plaintiffs argue that language found in school employment policy manuals, and in posters and other communications by the School to its employees, serves to waive sovereign immunity. In general, they contain language referring to the Act and documenting the Board's policy to comply with state and federal laws at all times, and use definitions and statements from the Act to describe the requirements of their employment system. For example, portions of the School's policy manual state that the School is to comply with the Act and related federal and state laws, and that an employee's rights under the Act may not be waived. The School's system regulations provide that, "No employee may agree, even voluntarily, to work in violation of the [Act]."

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[4] Sovereign immunity, often called governmental immunity as applied to governmental subdivisions – *see Nueces County v. Hoff*, 105 S.W.3d 208, 211 n.3 (Tex. App. – Corpus Christi 2003, no pet. h.) – embraces two principles: immunity from suit and immunity from liability. First, the State retains immunity from suit, without legislative consent, even if the State's liability is not disputed. Second, the State retains immunity from liability though the Legislature has granted consent to the suit. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997); *City of Texarkana v. City of New Boston*, No. 06-04-00023-CV, 2004 WL 1665012 (Tex. App. – Texarkana July 23, 2004, no pet. h.). When the State contracts with a private person, it waives immunity from liability, but not immunity from suit. *See Fed. Sign*, 951 S.W.2d at 408. Immunity from suit bars a suit against the State unless the State expressly gives its consent to the suit. *Id.*

Essentially, Plaintiffs argue that the Board, by its conduct, has waived sovereign immunity for employee claims under the Act. There is, however, no authority to support the position that the Board had the right to act in place of the Legislature in this context. Decisions to waive immunity are properly made by the branch of government to which the Constitution entrusts the obligation. *Taylor*, 106 S.W.3d at 695.

Even if there was authority that the Board had the power to waive immunity, the fact that the Board chose to implement its employment practices in line with federal requirements is not equivalent to an explicit agreement to waive sovereign immunity. In parallel situations, express consent is required to show that immunity from a breach of contract suit has been waived. *See Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 248 (Tex. 2002). In all such cases, legislative consent for suit or any other sovereign immunity waiver must be "by clear and unambiguous language." TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2004-2005); *Pelzel*, 77 S.W.3d at 248; *Fed. Sign*, 951 S.W.2d at 405. When determining whether there is a clear and unambiguous waiver of immunity from suit, we generally resolve any ambiguity in favor of retaining immunity. *See Taylor*, 106 S.W.3d at 697.

Nothing suggests the Legislature either has authority to delegate, or has delegated, to the School or its Board the power to waive sovereign immunity. There is also nothing to show that, even had such delegation occurred, the School waived immunity by clear and unambiguous language. We conclude the trial court properly granted the motion to dismiss.

We affirm the judgment.

/s/ Josh R. Morriss, 3d
Josh R. Morriss, III
Chief Justice

Date Submitted: July 12, 2004
Date Decided: September 24, 2004

[SEAL]

Court of Appeals
Sixth Appellate District of Texas

JUDGMENT

Helen Lavonne Wells, Maried R. Moore, Nelda L. Harrison and Jane A. Sloan, Appellants

No. 06-04-00001-CV V.

Texas A&M University System d/b/a Texas A&M University-Commerce, Texas A&M University-Commerce, and Dr. Keith McFarland, President of Texas A&M University Commerce, Appellees

Appeal from the 196th Judicial District Court of Hunt County, Texas (Tr. Ct. No. 65,080). Memorandum Opinion delivered by Chief Justice Morriss, Justice Ross and Justice Carter participating.

BE IT REMEMBERED, that in accordance with the Court's opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it is **ORDERED** that the judgment of the court below is in all things **AFFIRMED**.

It is further **ORDERED** that the appellants, Helen Lavonne Wells, Marie R. Moore, Nelda L. Harrison and Jane A. Sloan, pay all costs incurred by reason of this appeal.

RENDERED SEPTEMBER 24, 2004
BY ORDER OF THE COURT
JOSH R. MORRISS, III
CHIEF JUSTICE

ATTEST:
Linda Rogers, Clerk

NO. 65,080

HELEN LAVONNE WELLS, MAIRE R. MOORE, NELDA L. HARRISON, and JANE A. SLOAN, *Plaintiffs*,	§	IN THE DISTRICT COURT OF
v.	§	
TEXAS A&M UNIVERSITY SYSTEM d/b/a TEXAS A&M UNIVERSITY-COMMERCE, TEXAS A&M UNIVERSITY-COMMERCE, and DR. KEITH McFARLAND, President of TEXAS A&M UNIVERSITY COMMERCE, *Defendants*.	§	HUNT COUNTY, TEXAS
	§	196TH JUDICIAL DISTRICT

ORDER GRANTING DEFENDANTS' AMENDED MOTION TO DISMISS FOR LACK OF JURISDICTION

CAME TO BE HEARD on this the 19th day of September, 20023, Defendants' Amended Motion to Dismiss for Lack of Jurisdiction. Having considered the motion, the Court is of the opinion that Defendants' motion is meritorious and that the Court lacks jurisdiction and this matter should be DISMISSED.

It is therefore ORDERED, ADJUDGED and DECREED that this matter is hereby DISMISSED with prejudice and that the Plaintiffs take nothing by reason of their suit.

SIGNED this the 19 day of September, 2003.

/s/ Joe M. Leonard
PRESIDING JUDGE

NO. 65,080

HELEN LAVONNE WELLS, MARIE R. MOORE, NELDA L. HARRISON, and JANE A. SLOAN, *Plaintiffs,*	§	**IN THE DISTRICT COURT OF**
VS.	§	
TEXAS A&M UNIVERSITY SYSTEM d/b/a TEXAS A&M UNIVERSITY-COMMERCE, TEXAS A&M UNIVERSITY-COMMERCE, and DR. KEITH McFARLAND, President of TEXAS A&M UNIVERSITY-COMMERCE, *Defendants.*	§	**HUNT COUNTY, TEXAS**
	§	**196TH JUDICIAL DISTRICT**

ORDER ON PLAINTIFFS' MOTION TO ABATE

On January 3, 2003, the court considered Defendants' Motion to Dismiss for Lack of Jurisdiction as well as Plaintiffs' Motion to Abate. The court, after considering all the evidence, facts and argument of the parties

GRANTS Plaintiffs' Motion to Abate and hereby abates further action on Defendants' Motion to Dismiss for Lack of Jurisdiction until July 1, 2003, in order to give Plaintiffs' sufficient time to pursue and/or obtain Legislative permission to maintain this action against Defendants.

SIGNED on 1-15-03.

/s/ Joe M. Leonard
Honorable Judge
Joe Leonard Presiding

NO. 65,080

HELEN LAVONNE WELLS, MARIE R. MOORE, NELDA L. HARRISON, and JANE A. SLOAN,	§	**IN THE DISTRICT COURT OF**
Plaintiffs,	§	
VS.	§	
TEXAS A&M UNIVERSITY SYSTEM *dba* TEXAS A&M UNIVERSITY-COMMERCE, TEXAS A&M UNIVERSITY-COMMERCE, and DR. KEITH McFARLAND, President of TEXAS A&M UNIVERSITY-COMMERCE,	§	**HUNT COUNTY, TEXAS**
Defendants.	§	**196TH JUDICIAL DISTRICT**

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

CAME TO BE HEARD on this the 14th day of October, 2002, Defendants' Motion to Dismiss for Lack of Jurisdiction. Having considered Defendants' Motion to Dismiss and Plaintiffs' Response to Defendants' Motion to Dismiss and having heard evidence and arguments of counsel, the Court is of the opinion that Defendants' Motion is without merit and should be denied.

IT IS THEREFORE ORDERED that Defendants' Motion to dismiss for Lack of Jurisdiction is hereby DENIED.

SIGNED this the 17 day of October, 2002.

/s/ Joe M. Leonard
JOE LEONARD,
PRESIDING JUDGE
196th Judicial District Court

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 **(512) 463-1312**

January 21, 2005

Ms. LaNelle L. McNamara
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RE: Case Number: 04-1011
Court of Appeals Number: 06-04-00001-CV
Trial Court Number: 65,080

Style: HELEN LAVONNE WELLS, MARIE R. MOORE, NELDA J. HARRISON AND JANE A. SLOAN
v.
TEXAS A&M UNIVERSITY SYSTEM D/B/A TEXAS A&M UNIVERSITY COMMERCE, ET AL.

Dear Counsel:

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

Sincerely,

/s/ Andrew Weber
Andrew Weber, Clerk

by Claudia Jenks,
Chief Deputy Clerk

cc: Ms. Linda Rogers
Ms. Stacey Landrum